UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID WILKINS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. H-03-5831
	§	
HARRIS COUNTY SHERIFF'S DEPARTMENT, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Before the court[1] is Defendant Higher Dimension's motion for summary judgment (Dkt. No. 35) pursuant to Federal Rule of Civil Procedure 56, and concise summary (Dkt. No. 36); Plaintiffs David and Roxanne Wilkins's response to the motion for summary judgment (Dkt. No. 38) and concise summary (Dkt. No. 44); and Higher Dimension's reply (Dkt. Nos. 39, 40).

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment must demonstrate that there are no genuine issues of material fact. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is 'genuine' if the evidence could lead a

[1] This motion was referred to this magistrate judge for determination pursuant to 28 U.S.C. § 636(b)(1) (Dkt. No. 48).

reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 342 (5th Cir. 2001). If the moving party does meet its burden, then the non-movant cannot merely rely on the allegations in its pleadings; rather the burden shifts to the nonmoving party to present specific and supported material facts, of significant probative value, to preclude summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). If the evidence presented to rebut the summary judgment motion is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *See Anderson*, 477 U.S. at 255.

Plaintiffs David and Roxanne Wilkins allege that defendant Bozie Glass, a Deputy Sheriff with the Harris County Sheriff's Department, used "unreasonable, unnecessary, and excessive force" while David Wilkins attempted to park his vehicle at the premises of Higher Dimension Church. (Dkt. No. 35, at 1). The facts, viewed most favorably to the plaintiffs as the nonmoving party, may be summarized as follows: On April 13, 2003, David Wilkins entered the church parking lot where Glass, also a

deacon for the church, was directing traffic. Glass worked at the church in his off-hours controlling traffic and providing security for vehicles. Glass instructed Wilkins not to enter the church parking lot, leading to an altercation between the men. Wilkins contends that while he obeyed Glass's instructions, Glass nevertheless struck the hood of his vehicle, grabbed him through the open window, began striking him, and drew his weapon. Wilkins was then placed in handcuffs and arrested, although criminal charges were later dismissed for insufficient evidence. Roxanne Wilkins was pregnant at the time, and alleges the stress associated with this incident contributed to the termination of her pregnancy.

The plaintiffs have filed a complaint against the Houston County Sheriff's Department, Bozie Glass, and Higher Dimension Church, alleging violations of 42 U.S.C. § 1983, negligence, false arrest and imprisonment, slander, and gross negligence. They allege Higher Dimension Church is vicariously liable for the actions of Bozie Glass, based on the doctrines of respondeat superior and agency. Higher Dimension maintains Glass was an independent contractor at the time in question.

Higher Dimension asserts that it is entitled to summary judgment for essentially four reasons: (1) it cannot be held vicariously liable under a theory of respondeat superior, or agency, because Bozie Glass was an independent contractor; (2) it cannot be held liable for negligence because it did not breach a duty to the Wilkins or

proximately cause their injuries; (3) it cannot be held liable for gross negligence because the hiring and/or retaining of Glass as an independent contractor did not present a likelihood of serious injury, nor was it aware of any risk of same; and (4) it cannot be liable under a bystander claim because Roxanne Wilkins did not contemporaneously perceive the incident.

I. Vicarious Liability

Higher Dimension argues that it cannot be held vicariously liable for the conduct of Bozie Glass under the doctrine of respondeat superior, or under an agency theory, because Glass was an independent contractor for the church. The test to determine employee versus independent contractor status is whether the putative employer has the right to control the progress, details, and methods of operations of the work. *See Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). The right to control a worker's conduct is the most important component of the determination. *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 786 (Tex. App.–El Paso 1996). Five factors are analyzed to determine the degree of control: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about final results; (4) the time for which the

worker is employed; and (5) the method of payment, whether by unit of time or by the job. *Limestone Prods.*, 71 S.W.3d at 312.

Higher Dimension contends Glass was an independent contractor, acting in his capacity as a Deputy Sheriff, when he was directing traffic on the public street in front of the church. Higher Dimension maintains Glass worked independently; supplied all the tools and materials necessary to conduct the job; had the right to control the progress of the work encompassing his duties at Higher Dimension as demonstrated by the fact that no representative of the church gave Glass instruction or training; worked on an as-needed basis; and was paid based upon hours worked, with no additional formal benefits.

The plaintiffs counter Glass was enforcing the rules and regulations of Higher Dimension Church regarding parking at the time of this incident; in particular, enforcing what Glass believed to be a rule of the church that parking spaces could not be "saved." Thus, the plaintiffs posit, there is at the very least a fact issue whether Glass was a public officer or a servant of Higher Dimension when the incident occurred, relying on *Blackwell v. Harris County*, 909 S.W.2d 135 (Tex. App.–Houston [14th Dist.] 1995). In *Blackwell*, the court explained the status of off-duty police officers is determined by analyzing the capacity the officer was acting in at the time he committed the acts at issue:

> If he is engaged in the performance of a public duty such as the enforcement of general laws, his [private or temporary] employer incurs no vicarious responsibility for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent, servant of employer.

Id. at 139 (alteration in original).

The plaintiffs argue further that Higher Dimension's right of control over Glass is shown by a prior incident where he handcuffed a woman attempting to park at the church; rather than arrest her, he complied with the request of Reverend Olus Holder, Overseer of Pastoral Care at Higher Dimension Church, that she be released and no charges filed. Reverend Holder also stated that, had he arrived prior to Wilkins's arrest, he would have requested that Wilkins not be arrested, and that he would have expected Glass to give this request some weight.

While some factors may point to an independent contractor status,[2] these are not enough to conclude this as a matter of law. Under Texas law, whether a person is an employee or an independent contractor is normally a question of fact, unless there is no dispute as to the controlling facts, and only one reasonable conclusion from the facts

[2] For instance, Glass was paid on an hourly basis and provided some of the equipment used in performing his duties for Higher Dimension, although he also used church radio equipment to communicate with church volunteers who helped regulate traffic and parking in the church parking lot.

can be drawn. *See Bennack Flying Serv., Inc. v. Balboa*, 997 S.W.2d 748, 751-52 (Tex. App.–Corpus Christi 1999). Here a reasonable conclusion can be drawn that Glass was acting as an agent of Higher Dimension because "he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer." *Blackwell*, 909 S.W.2d at 139. Thus, there is a sufficient factual dispute making summary judgment inappropriate.

And such was the holding in a case very much like this one–*Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785-86 (Tex. App.–El Paso 1996)–where the court held there was a question of fact making summary judgment improper as to whether an off-duty police officer, employed as a security guard for a supermarket, was functioning as an officer, or as an independent contractor, when he became abusive towards a store patron in directing her to move her vehicle from the front of the store. Similarly, the court in *Ramirez v. Fifth Club, Inc.*, 144 S.W.3d 574, 588-89 (Tex. App.–Austin 2004), found enough evidence to reject an "independent contractor" claim, where an off-duty peace officer working as a security guard for a nightclub, slammed a patron's head into a wall while making an arrest. The court reasoned the officer was acting for the benefit of the nightclub, and was subject to its control, and was thus not functioning as a peace officer. *Ramirez*, 144 S.W.3d at 5890. And in *Coleman v. Manuel*, 244 S.W.2d 256, 257 (Tex. Civ. App.–Austin 1951), the court

held that in directing traffic outside of a movie-theater, off-duty police officers were acting for the private benefit of a commercial enterprise, rather than in the interest of the public.

Therefore, under the *Blackwell* standard for determining the status of an off-duty police officer, there is a genuine issue of material fact whether Glass may have been subject to the control of the church, and therefore an employee or agent of it, which should preclude summary judgment.

II. Negligent Hiring/Supervision/Retention

Higher Dimension's next basis for summary judgment is that it cannot be held liable for negligent hiring, supervision and/or retention, because it did not breach a duty to the plaintiffs or proximately cause their injuries.[3] A claim for negligent hiring, retention, or supervision requires proof the employer hired an incompetent or unfit employee whom it knew, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 324 (Tex.

[3] Unlike vicarious liability, negligent hiring, retention, and supervision are simple negligence causes of action based on an employer's direct negligence, and thus, liability is not dependent upon a finding that the employee was acting in the course and scope of his employment when the purported tort occurred. *See Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.–Fort Worth 2002); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex. App.–Corpus Christi 1987). The duty of an employer under the theory of negligent hiring and supervision can extend to prevent a legally compensable injury to third parties by either an employee or an independent contractor. *See Sibley v. Kaiser Found. Health Plan of Texas*, 998 S.W.2d 399, 403-04 (Tex. App.–Texarkana 1999); *Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex. App.–Houston [14th Dist.] 1998).

App.–Beaumont 2004). To successfully prosecute such a claim, a plaintiff is required to show that: (1) the employer owed a legal duty to protect third parties from the employee's actions, and (2) the third party sustained damages proximately caused by the employer's breach of that legal duty. *EMI Music Mexico, S.A. de C.V. v. Rodriguez*, 97 S.W.3d 847, 858 (Tex. App.–Corpus Christi 2003).

Higher Dimension asserts that it did not breach a duty owed to the plaintiffs because it used ordinary care in hiring Glass, and relied on the State's licensing of Glass as a peace officer with the Harris County Sheriff's Department to determine that Glass was qualified to direct traffic at the church. Glass was a licensed peace officer, certified by the Texas Commission on Law Enforcement Standards and Education. Moreover, Higher Dimension argues that it did not proximately cause any injuries to the plaintiffs. Higher Dimension maintains the cause-in-fact of the plaintiffs' injuries was David Wilkins's failure to follow orders given to him by an officer.

It is true that under certain circumstances, an employer is entitled to rely on the State's prior certification of an employee as a peace officer, and thus has no duty to further inquire about his qualifications.[4] Here, however, Higher Dimension knew of a

[4] In *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 227-28 (Tex. App.–Houston [14th Dist.] 1994), for instance, the court held there was insufficient evidence to support a jury finding of negligence, in part, because it reasoned that the company was justified in relying on the training of state-certified peace officers. And the court in *Leger v. Texas EMS Corp.*, 18 F. Supp. 2d 690, 696 (S.D. Tex. 1998), in granting the defendant's motion for summary judgment on a negligence claim, held that an emergency medical services provider was entitled to rely on the presumption that its state-certified technicians were properly trained in those areas in which they were certified.

prior incident where Glass may have overreacted with physical violence towards a woman attempting to park at the church. In *Duran*, 921 S.W.2d at 790, the court held that summary judgment was not appropriate on a negligent hiring claim where a supermarket made no inquiry into the background of an off-duty police officer working as a security guard where there was a prior complaint that he verbally abused a store patron. Here, Higher Dimension was on notice that Glass may have been physically abusive on a prior occasion to someone attempting to park at the church,[5] and that he might have a propensity to violence if he felt his parking instructions were not complied with. No inquiry was made into Glass's background or training after this incident occurred[6] to verify his competence and fitness, and no further training or supervision was provided by the church.[7] Thus, it cannot be said as a matter of law that Higher Dimension used reasonable care in the hiring, retention, and supervision of Glass. Nor can it be said that the cause-in-fact of the plaintiffs injuries was David Wilkins's failure to obey an officer, rather than Higher Dimension's act or omission in regards to Glass's

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[5] Reverend Olus Holder came outside during this incident and saw that Glass had a young lady handcuffed, and asked Glass to release her. *See* Dkt. No. 38, Exh. D, at 29-30. Ramone Harper, Director of Church Administration, testified that he was aware of the incident where Glass placed a woman in handcuffs. *See* Dkt. No. 38, Exh. F, at 13.

[6] Deacon Bruce Wynn, leader of Higher Dimension's SAFE Ministry ("Security Assurance for Eternity"), responsible for parking at the church facilities, testified that he knew nothing about Glass's training. *See* Dkt. No. 38, Exh. E, at 26.

[7] For instance, Bruce Wynn testified that no training, instructions, or supervision was given to Glass in how to perform his duties. *See* Dkt. No. 38, Exh. E, at 15-23. Reverend Olus Holder indicated the same thing. *See* Dkt. No. 38, Exh. D, at 9, 26.

retention or supervision. Thus, summary judgment should not be rendered on the negligence claims.

III. Gross Negligence

Higher Dimension contends that it cannot be held liable for gross negligence because the hiring and/or retaining of Glass did not present a likelihood of serious injury, nor was it aware of any such risk. Gross negligence involves two components: (1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *See Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225 (Tex. 2004). The "extreme risk" required must involve the likelihood of serious harm to the plaintiff. *See Crooks v. Moses*, 138 S.W.3d 629, 640 (Tex. App.–Dallas 2004). And the "actual awareness" in connection with gross negligence, means the defendant knew about the peril, but its acts or omissions demonstrated it did not care. *Crooks*, 138 S.W.3d at 640.

It is a common practice in the state of Texas for private entities to hire off-duty police officers to direct traffic and/or provide security. *See Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 227 (Tex. App.–Houston [14th Dist.] 1994). The

plaintiffs provide no evidence and cite no authority that simply hiring an off-duty officer to direct traffic in a church parking lot involves an extreme degree of risk. And the plaintiffs' argument–that because the officer is armed and might have to make an arrest, and in the event of such an arrest, might use a weapon that could result in serious bodily injuries or death–is too tenuous, and fails the requisite element of foreseeability,[8] to create a genuine fact issue with regard to gross negligence by itself. Only if the defendant's act is likely to cause serious harm, can it be grossly negligent. *Loram Maint. of Way, Inc. v. Ianni*, 141 S.W.3d 722, 736 (Tex. App.–El Paso 2004).

However, a reasonable jury might well infer that Glass's continued employment presented an extreme risk due to the prior incident where Glass tackled a woman for failing to obey his parking instructions. Considering this additional factor, there is a genuine issue of material fact whether Higher Dimension was grossly negligent in retaining and/or failing to adequately supervise Glass. In *Ianni v. Loram Maint. of Way, Inc.*, 16 S.W.3d 508, 526-27 (Tex. App.–El Paso 2000), the court held there was a genuine issue of material fact whether an employer was liable for gross negligence where its employee shot a police officer, because the employer knew there was

[8] Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Castillo v. Gared, Inc.*, 1 S.W.3d 781, 786 (Tex. App.–Houston [1st Dist.] 1999). Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury. *Id.*

rampant drug use by its employees and was aware of a previous attack by one of its employees.

Likewise, if Glass did in fact violently tackle a woman to the ground on a prior occasion, then Higher Dimension knew that Glass presented some risk to church patrons that Glass would overreact if he felt his parking instructions were not complied with. Whether this was an "extreme risk," i.e., one that presented a likelihood of serious harm to those using the church's parking lot, is a factual question unsuited for determination in a summary judgment motion. As to the second prong of gross negligence, Higher Dimension was subjectively aware of this incident, and thus aware of the risk. Given these material fact issues, summary judgment is unwarranted on the gross negligence claim.

IV. Bystander Claim

Higher Dimension next moves for summary judgment on the plaintiffs' bystander claim, maintaining the plaintiffs cannot recover as a matter of law because Roxanne Wilkins did not observe the entire incident. In order to establish a bystander claim, a plaintiff must demonstrate: (1) that she was located near the scene of the accident; (2) that she suffered shock as a result of a contemporaneous observance of the accident; and (3) that she and the victim were closely related. *See United Servs. Auto. Assoc. v. Keith*, 970 S.W.2d 540, 541-42 (Tex. 1998).

In this case there is no real dispute that Roxanne Wilkins satisfies elements one and three, as she was near the church parking lot during the incident and she is married to David Wilkins. But with respect to the second element, Higher Dimension contends that Roxanne Wilkins could not see the entire incident, as evidenced by David Wilkins's deposition testimony. David Wilkins testified that his wife was some twenty to thirty feet away and could have only seen the incident through the windows of the vehicle from where she was positioned.[9] However, in the plaintiffs' first amended complaint, they state Roxanne Wilkins saw cops and parking attendants running toward her husband's vehicle and then she "could see her husband in the truck and he was moving, then all of a sudden he was out the truck then on the ground." (Dkt. No. 42, ¶ 18). Thus, while Roxanne Wilkins's view may have been somewhat obstructed by the vehicle, an inference can be drawn that she contemporaneously witnessed the incident through the windows of the vehicle. Higher Dimension has failed to demonstrate the absence of a genuine issue of material fact, and therefore, summary judgment should not be granted on the bystander claim.

V. Claims for False Imprisonment, False Arrest, and Defamation

Higher Dimension offers no additional arguments in its summary judgment motion or reply on the causes of action for false arrest and imprisonment, or

[9] *See* Dkt. No. 38, Exh. A, at 24; Dkt. No. 39, Exh. I, at 22-23.

defamation, because it argues that the plaintiffs have only asserted these causes of action against Glass. However, it is not entirely clear from the first amended complaint that the plaintiffs are not attempting to hold Higher Dimension vicariously liable on these claims as well. *See* Dkt. No. 42, at ¶¶ 24, 26-29, 32. Since Higher Dimension makes no argument and offers no authority why there is no genuine issue of material fact on these claims, summary judgment is not appropriate. *See Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001) (the party moving for summary judgment must demonstrate that there are no genuine issues of material fact).

VI. Conclusion

For these reasons, the court RECOMMENDS that Higher Dimension's motion for summary judgment (Dkt. No. 35) be DENIED.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties. The parties have ten (10) days from receipt to file written objections to the Memorandum and Recommendation. *See* FED. R. CIV. P. 72. Absent plain error, the failure to file written objections bars an attack on the factual findings, as well as the legal conclusions, on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208. Copies of the objections must

be mailed to the opposing party and to the chambers of the magistrate judge, 515 Rusk, Suite 7727, Houston, Texas 77002.

Signed on December 10, 2004, at Houston, Texas.

Stephen Wm. Smith
United States Magistrate Judge